Service Date: June 25, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application of U S WEST Communications, Inc. to Discontinue Centrex Plus Service,	)	UTILITY DIVISION
and	)	DOCKET NO. D96.2.15
IN THE MATTER of the Application of PTI Communications to Discontinue Digitrex II Service.	)	ORDER NO. 5905d

ORDER ON MOTION FOR RECONSIDERATION

Introduction and Procedural Background

AT&T Communications of the Mountain States, Inc. (AT&T) and MCI Telecommunications Corporation (MCI) filed a Joint Petition for Reconsideration in this Docket on April 7, 1997, asking that the Montana Public Service Commission (Commission) reverse its decision in Order No. 5905c dated February 25, 1997. Order No. 5905c permitted U S WEST Communications, Inc. (U S WEST) to withdraw its Centrex Plus service and permitted PTI Communications (PTI) to withdraw its Digitrex II service (collectively, Centrex). The Commission's Final Order also required U S WEST and PTI to continue offering the services to existing customers, who become grandfathered. Alternatively, if the Commission does not reverse its decision, the Petitioners ask the Commission to vacate its Final Order and direct that an evidentiary hearing with oral argument be held to consider the arguments and evidence presented by them.

U S WEST has made filings to withdraw Centrex Plus in all 14 states in its operating region. It has been allowed to do so in Montana and one or two other states; the

rest of the states have not permitted U S WEST to withdraw and grandfather the service. Petitioners ask the Commission to "review the reasoning contained in orders from other states" and hold that U S WEST's and PTI's proposals to withdraw centrex service should be denied for two reasons: (1) because of the anticompetitive effect of the proposals, and (2) because U S WEST and PTI have not provided and cannot provide adequate proof to support their claims of uneconomic arbitrage.

Some of the states, while denying withdrawal of Centrex Plus, have other tariff terms and conditions in place which are quite different from U S WEST's Montana tariff, and thus, comparing the Montana filing with these states would be difficult. It is also unnecessary because the record in this case provides sufficient information from which to decide the issue for Montana.

In a work session held on May 28, 1997, the Commission voted to deny the Petitioners' Motion for Reconsideration and affirm its original decision.

Commission Decision

In their joint Motion for Reconsideration AT&T and MCI assert that the Commission's Final Order relies on legally or factually erroneous or irrelevant findings to support the decision to allow centrex withdrawal. The Petitioners claim the Commission's Final Order is anticompetitive, discriminatory, violates the federal Act, and is inconsistent with the public interest. They raise the following issues in their joint motion for reconsideration: (1) who has the burden of proof to show that the public interest will not be adversely affected by centrex withdrawal; (2) whether the Commission's definition of competition violates the terms of the Telecommunications Act of 1996,[1] the Federal Communications Commission's (FCC) Order and Montana law; (3) whether AT&T was denied due process; (4) whether the Commission's findings are supported by substantial evidence; and (5) whether subsequent events demonstrate that the Commission's Final Order is anticompetitive.

[1]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending the Communications Act of 1934, 47 U.S.C. § 151 *et seq*., to be codified as amended in scattered sections of 47 U.S.C.).

A. The burden of proof.

I. AT&T and MCI claim that the Commission's Order rests on an implicit conclusion that they have the burden to prove that withdrawal of centrex services will not adversely affect the public interest. They further claim that the Commission failed to support this conclusion with a reasoned analysis. They argue that U S WEST and PTI bear the burden of proof and must show that the withdrawal of centrex service does not violate the Act or Montana law, and is in the public interest. AT&T and MCI ask the Commission to reconsider the evidence in this proceeding while placing the burden of proof where it belongs. According to AT&T and MCI, U S WEST and PTI have failed to support their request for withdrawal with adequate evidence. As an alternative, the Commission is asked to vacate the Order and reopen the proceedings for full hearing and oral argument.

U S WEST responded, stating that because AT&T and MCI initially claimed that withdrawal is anticompetitive, they have the burden of proving their claim under Montana's rules of evidence. Section 26-1-401, MCA, provides that the initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Similarly, § 26-1-401 MCA, states that "a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting."

The Order states that centrex withdrawal is not anticompetitive because AT&T and MCI will have the opportunity to sell all retail services, including replacement centrex services, at a wholesale discount, will be able to combine unbundled network elements to create other retail services, can offer facilities-based alternatives to centrex and can resell Centrex Plus and Digitrex II to grandfathered customers. Furthermore, withdrawal of centrex would not negatively affect AT&T and MCI's plans to enter local markets because both have said that entry requires rules on interconnection and unbundling in addition to wholesale rates for resale of services.

The burden of proof was properly applied in the Final Order. U S WEST and PTI had the initial burden of producing evidence to demonstrate that withdrawing centrex services is consistent with the public interest and should be permitted. The public

interest includes the policies expressed by the Montana Legislature and set forth in the Montana Telecommunications Act. *See* § 69-3-802, MCA. When U S WEST and PTI established that centrex withdrawal was not inconsistent with the public interest, the burden shifted to the Petitioners to produce evidence to support their claims. Thus, MCI and AT&T had the burden to prove their claim that centrex withdrawal was anticompetitive by a preponderance of the evidence. The Commission concluded that Petitioners did not introduce sufficient evidence to meet that burden, after having been given the opportunity to produce evidence as to why centrex should not be withdrawn.

AT&T and MCI further requested that if the Commission did not grant their motion based on the burden of proof argument, it should reopen the record and hold a hearing for further receipt of evidence. The parties stipulated to vacate the hearing that had been scheduled for September 18, 1996, and to submit this matter on a stipulated record for briefing by the parties. As explained in this Order and in the Final Order, the record in this matter supports the Commission decision, without the addition of supplemental evidence. Moreover, AT&T and MCI have not identified any particular additional evidence, other than cost studies AT&T was not permitted to obtain from U S WEST, that they believe should be considered which was not identified prior to the stipulation of the record in this matter or their reasons for not producing such evidence prior to stipulating.

B. <u>The Commission's Final Order does not inappropriately limit local exchange competition to that which is sustainable and efficient</u>.

In the Final Order, the Commission stated that the transition to competitive local telecommunications markets should lead to sustainable and efficient competition. AT&T and MCI assert that there is no provision in the Act or Montana law which limits the definition of competition to that which is sustainable and efficient. They argue that without such limiting language, the Commission should construe its authority to encourage competition when and where it can exist, as long as there is no adverse effect on the public interest.

The Petitioners assert three reasons to support their argument that the Commission should not limit competition in this manner: (1) It is inconsistent with the

Act, because the Act requires the Commission to allow competition, subject only to competitively neutral universal service and consumer protection provisions; (2) the Commission failed to acknowledge the FCC's concerns about the anticompetitive effects of LEC withdrawals of services; and (3) Montana law requires the Commission to encourage the orderly transition to competition, while maintaining universal service.

In carrying out its duty to encourage competition, if the Commission cannot attempt to structure competition in an embryonic market to that which it believes should lead to sustainable and efficient competition, then it must equally encourage competition that is short-lived and inefficient. However, this argument fails because the Commission is charged by the Montana Telecommunications Act with overseeing an orderly transition from a regulated telecommunications market to a competitive one. A transition characterized by an unsustainable period of competition based on inefficiency will not lead to an orderly transition nor will it be in the public interest.

AT&T and MCI criticize as illogical the Commission's concern that competition based on centrex resale may quickly benefit some customers but may not lead to sustainable, economic long-term benefits. AT&T and MCI state that there can be no long-term benefits to competition and consumers without first having short-term benefits. But, short-term benefits may be lost over the long-term and competition and consumers may be worse off if emerging markets are not structured in ways that lead to sustainable and efficient competition. As the Commission recognized in the Final Order in this Docket, there is an important difference between protecting or promoting a competitor and encouraging competitive markets. The Commission's role is to facilitate regulatory and market structures that encourage competition in telecommunications markets.

Nothing in state or federal law requires the Commission to promote one or several competitors by sacrificing the public interest benefits attributed to efficient competitive markets. Allowing centrex withdrawal is consistent with the public interest because it does not foreclose AT&T and MCI or any other new entrant from entering local telecommunications markets, but prevents possible uneconomic competition while

the Commission considers broader questions concerning overall LEC revenue levels and rate rebalancing.

Moreover, the Commission did not fail to acknowledge the FCC's concerns about the anticompetitive effects of local exchange carriers' withdrawals of services. The Commission found that centrex withdrawal, with grandfathering for existing customers, is consistent with the FCC Order as well as the 1996 Act and Montana law, and concluded as follows:

> 7. The Commission's approval of PTI and U S WEST's applications to withdraw Digitrex II and Centrex Plus, respectively, is not inconsistent with the 1996 Act and FCC regulations adopted on August 8, 1996, to implement the Act, nor does it create a barrier to entry in the Montana telecommunications market. First Report and Order, ¶¶ 965-968.

Final Order, Docket No. D96.2.15, Order No. 5905c, page 19 (Feb. 25, 1997). The Final Order also stated that, "Based on the record in this case it is not clear that centrex service is so essential to the public that regulation must ensure its continued availability." Final Order, at 17-18, ¶ 73. The FCC found that it is up to each state to decide whether a service withdrawal inhibits the development of competition and serves the public interest. However, the law does require that new entrants be allowed to resell a grandfathered service to grandfathered customers. This requirement is met with the Commission's order.

Further, the Commission specifically referred to § 253 of the Act, stating that without a thorough evaluation of issues concerning incumbent LECs' present revenues, rate rebalancing and universal service, "permitting broad resale of centrex may unreasonably force LECs to shed market share and revenues and may not be consistent with the competitive neutrality provisions of the 1996 Act." Final Order, at 17, ¶ 70.

C. The Commission did not deny AT&T due process by refusing to grant AT&T's Motion to Compel U S WEST to respond to certain data requests regarding costs studies and subsequently determining that resale of centrex could result in uneconomic arbitrage.

The Petitioners claim that their due process rights were violated by basing the decision on issues which would have been addressed with the information AT&T was not permitted to obtain through discovery requests. They argue that the Commission

erroneously concluded that centrex resale "could cause uneconomic bypass," without sufficient information to analyze this issue. The information relates to cost studies that the Commission declined to require from U S WEST, stating that the information requested should be considered in conjunction with a comprehensive review of all of each of the company's services and the underlying network elements and functions used to provide those services.

The primary justification for the Commission's decision is that none of the AT&T and MCI objections to withdrawal hold true. The potential for uneconomic arbitrage was not one of the reasons AT&T and MCI objected to the filing.

Second, the Commission states at ¶ 66 of its Final Order that "it does not appear that any of the data requests U S WEST was not required to answer would have provided any relevant information about the cost effectiveness of centrex in an environment where it could be resold as basic business service under the current price structure." The issue of uneconomic arbitrage relates to costs that would be incurred to provide centrex beyond its intended use compared to current prices. The data requests U S WEST was not required to answer concern revenues and contribution levels associated with the historical provision of centrex, among other services, and would not have shed any light on the issue of uneconomic arbitrage. The AT&T and MCI Joint Motion does not reference this finding nor does it provide any argument as to why the Commission should reconsider this finding.

Third, the Commission readily acknowledged in its Final Order that empirical evidence does not exist in the record to show that the arbitrage would be uneconomic. The Commission added that the revenue requirement and cost of service analyses that would be necessary to make such a showing are beyond the scope of this proceeding.

Nevertheless, consideration of potential public interest effects from uneconomic arbitrage is reasonable. Uneconomic arbitrage could cause uneconomic bypass by consumers. Thus, the Commission's uneconomic arbitrage concern is directly related to ensuring that consumers are provided price signals that allow them to make economically efficient service selections. Both competition and the public interest are

served by promoting proper price signals. PTI and U S WEST testified that dispersed, single line business usage is beyond the intended use of centrex service. The concern then is the potential for resellers to offer single-line business service at prices that are too low if the price of the centrex service they are reselling does not reflect the costs of such use and that this ultimately could lead to uneconomic bypass. PTI testified that the cost of providing centrex to dispersed, single-line business customers is five times the cost of providing the service to the typical centrex customer. This testimony was not challenged by AT&T and MCI. Where there is a compelling logical argument that centrex resale may lead to incorrect price signals and there is no argument to the contrary, the absence of empirical evidence does not constitute a valid reason for the Commission to forego caution.

The uneconomic arbitrage issue is raised as additional support for allowing centrex withdrawal. However, the decision does not depend on this argument. AT&T and MCI were not denied due process by the Commission's discussion of this concern.

D. The Commission's findings are supported by substantial evidence.

The Petitioners argue that the Commission made several findings which are not supported by substantial evidence in the record. These findings are: (1) centrex resale will harm universal service; (2) U S WEST and PTI provided no evidence to support claims of uneconomic arbitrage; (3) centrex withdrawal is not anticompetitive or anti-consumer; and (4) centrex withdrawal will not adversely affect competition or harm the public interest.

The Petitioners infer that the Commission based its individual findings and conclusions solely on the basis of one factor, such as the absence of competitors in local markets. These arguments are all related to the ability of the Petitioners to enter the Montana local exchange market swiftly as providers of centrex resale. Their arguments emphasize the potential impact on AT&T and MCI as providers of centrex resale services, rather than focusing on the benefits of competition to consumers and the Commission's duties under both federal and state law, which include managing an orderly transition to competition and ensuring that the public interest is unharmed and the goal of competitive neutrality is achieved.

The record does contain substantial evidence to support the Commission's conclusions. Substantial evidence means there is some evidence to support the findings. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a scintilla of evidence and may be somewhat less than a preponderance of evidence. Martinell v. Montana Power Co., 268 Mont. 292, 319, 886 P.2d 421 (1994). The Commission found the testimony of Ted Otis to be particularly helpful in determining that universal service might be affected by a decision to deny withdrawal of centrex.

E. Subsequent events do not require reconsideration of centrex withdrawal.

I. MCI and AT&T also argue that subsequent events provide additional evidence of the anticompetitive effect of U S WEST and PTI's withdrawal of centrex services. They refer to the issuance of Order No. 5961b in Docket No. D96.11.200, the Commission's arbitration of an interconnection agreement for U S WEST and AT&T, and the recent tariff filings made by PTI and U S WEST which are substitute services for the withdrawn centrex services.

MCI and AT&T further argue that the result of the Commission's decision to withdraw centrex service is that they will have to pay more money to provide that service to potential customers, resulting in a price squeeze, and also that it is not clear that the new filings are in fact replacements for the withdrawn services.

These subsequent events do not constitute a sufficient reason to reconsider the decision in this Docket. The decision in D96.11.200 is not inconsistent with the Final Order in this Docket and the Final Order did not require that substitute services be made available.

Conclusions of Law

The Commission has authority to do all things necessary and convenient in the exercise of its powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

The Commission's approval of PTI and U S WEST's applications to withdraw Digitrex II and Centrex Plus, respectively, is not inconsistent with the 1996 Act and FCC regulations adopted on August 8, 1996 to implement the Act, nor does it create a barrier to entry in the Montana telecommunications market. First Report and Order, ¶¶ 965-968.

Withdrawal of Digitrex II and Centrex Plus is not contrary to Montana law and is consistent with the public interest and Montana public policy as set forth in § 69-3-802, MCA.

Order

THEREFORE, based on the foregoing, IT IS ORDERED that the Joint Petition for Reconsideration of AT&T and MCI is DENIED.

DONE AND DATED this 10th day of June, 1997, by a vote of 3-2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
DAVE FISHER, Chairman

_____
NANCY MCCAFFREE, Vice Chair

_____
BOB ANDERSON, Commissioner
(Voting to Dissent)

_____
DANNY OBERG, Commissioner

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BOB ROWE, Commissioner
(Voting to Dissent - attached)

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

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DISSENT OF COMMISSIONER ROWE

My dissent to the original order explained my view of the positions to be balanced, and suggested that a reasonable approach would be to condition withdrawal of Centrex Plus and

Digitrex II on approval of adequate substitute services.

A partial replacement has been filed and approved for U S WEST. The PTI replacement has been filed with the Commission, but issues remain outstanding and it has not been finally approved. In other respects, the Commission's decision appears reasonable.

Respectfully submitted this 10th day of June, 1997.

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BOB ROWE, Commissioner